IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-904

FLM COLLISION PARTS, INC.,

Petitioner,

—against—

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 543 F.2d 1019 (2d Cir. 1976). The opinions of the District Court for the Southern District of New York are reported at 406 F. Supp. 224 (S.D.N.Y. 1975) and 411 F. Supp. 627 (S.D.N.Y. 1976). The opinions all appear in the appendix to the Petition.*

Jurisdiction

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The order of the Court of Appeals was entered on September 30, 1976, and orders denying rehearing and/or rehearing en banc were entered on November 16, 1976.

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* References to pages of the appendix to the Petition are preceded by the letter "a".

Questions Presented

The Petition does not present any questions meriting review by this Court. The issues are:

1. Was the Court of Appeals correct in holding that Ford did not discriminate in price between dealers purchasing "crash parts"* when it offered an incentive allowance to its dealers on resales of crash parts to independent repair operations and did not offer the incentive allowance to its dealers on resales to any other kind of customer, thereby affording identical price treatment to all purchasers from Ford?

2. Was the Court of Appeals correct in holding that the District Court was not clearly erroneous when it found that Ford did not agree with its dealers to restrict dealer resales of crash parts to Petitioner?

STATEMENT OF THE CASE

Petitioner ("FLM") commenced this action on February 15, 1973 in the Southern District of New York, challenging Ford Motor Company's ("Ford")** system for the distribution of crash parts for Ford motor vehicles. FLM's complaint alleged violations of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,*** Sections

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* Crash parts are sheet metal parts such as fenders, grills and hoods which are custom designed and manufactured to fit particular years and models of motor vehicles. Ford crash parts are manufactured only by or for Ford; and Ford sells them only to its franchised dealers throughout the United States on uniform terms and at uniform prices based upon a so-called "dealer net" price which is generally Ford's suggested retail price less 40%.

** Ford Marketing Corporation, Ford's wholly-owned subsidiary and a co-defendant below, ceased doing business on December 31, 1974 and was merged into Ford Motor Company on that date. Both corporations are referred to collectively herein as "Ford".

*** 15 U.S.C. § 13(a).

1 and 2 of the Sherman Act* and Sections 3 and 7 of the Clayton Act.**

Ford sells crash parts *only* to Ford dealers. *FLM is not itself a Ford dealer and has never purchased crash parts from Ford.* FLM's dispute with Ford arises from the terms and conditions under which Ford grants an incentive allowance to its dealers on their resales of crash parts.

Since the 1950's Ford has made available an incentive allowance to dealers for routine automotive replacement parts such as spark plugs, filters and batteries when Ford dealers resell them to independent retailers. The allowance was first extended to dealer resales of crash parts in 1968 at the urging of the Federal Trade Commission "that independent auto repair shops be permitted to obtain crash parts at prices that would enable them to compete with Ford dealers in the repair business." (p. a-19).*** It was hoped that the availability of an incentive allowance on crash parts would encourage dealers to resell them to independent repair shops at prices approximating "dealer net"—the price dealers paid when they used similar parts in their own repair operations. As the Court of Appeals stated (p. a-9), the allowance " was designed to equalize the prices at which independent repair shops could obtain Ford parts with the prices paid by Ford dealers for the same parts."

Until the incentive allowance's requirements were revised in 1971, it was available to dealers on crash parts

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* 15 U.S.C. §§ 1, 2.

** 15 U.S.C. §§ 14, 18. These Clayton Act claims were abandoned before trial.

*** Contrary to the representation in the Petition (p. 11), the Commission never "advised" Ford that its method of distributing crash parts was "an unfair method of competition." The Commission only indicated that it was conducting an investigation of Ford's method of crash part distribution.

sold to almost any customer who purchased the parts for resale, the only exception being sales directly to another Ford dealer. A 1969 study of the incentive system as it applied to all Ford automotive replacement parts (not merely crash parts) revealed that, because of an unintended definitional loophole in the eligibility requirements, dealers were claiming the allowance on sales to customers such as other dealers by utilizing intermediaries (including wholesalers) as conduits. As the Court of Appeals noted (p. a-11), Ford's study indicated that "as much as $2.1 million of the $44.5 million in incentive payments claimed might be improper. Among other things, some dealers were selling parts to wholesale intermediaries and then claiming an incentive allowance for doing so, even though the wholesaler then resold the part to another Ford-franchised dealer." This second dealer, contrary to Ford's incentive allowance policy, might then claim a second incentive allowance for the same part by reselling it to an independent garage.

In order to close this loophole, Ford in 1971 changed the scope of the incentive allowance as it applied to all parts (including crash parts) by expressly providing that the allowance would be available to dealers only on resales to retailers (*i.e.*, customers other than Ford dealers engaged in automotive service and repair work).*

Since 1965, FLM has conducted a local business in Bronx and Westchester Counties, New York, in which it purchases Ford crash parts from Ford dealers and resells them to

* The Court of Appeals expressly recognized that "the 1971 revision of the plan was an attempt to further implement Ford's original intention of funnelling crash parts at reasonable prices to independent repair shops so as to improve competition in the auto repair business, and was not a device to circumvent the [Robinson-Patman] Act." (pp. a-19-a-20).

independent repair shops. The prices which FLM pays various Ford dealers for the parts it purchases, the terms on which it buys the parts, and the choice of dealers with which it does business are all matters of negotiation solely between FLM and the dealers; Ford has never played nor sought to play any role in such matters.

Prior to the 1971 revision of Ford's incentive allowance policy, dealers reselling crash parts to FLM received the incentive allowance on such sales. When the policy was changed to render ineligible for the allowance parts resold by dealers "to any customers not engaged in automotive service or repair work," sales to FLM no longer qualified.* Nevertheless, due to an oversight, Ford continued to pay the allowance to two dealers on their resales to FLM for 16 months—until November, 1972, when such payments were terminated. Despite the fact that since November 1, 1972 no Ford dealer has received the incentive allowance on resales of crash parts to FLM, Ford dealers have continued to fill FLM's orders—more than $1.9 million worth.

The District Court, sitting without a jury, ruled that Ford's revised incentive allowance policy was a form of price discrimination in violation of the Robinson-Patman Act. At the same time, the District Court dismissed each of FLM's Sherman Act claims based on factual findings that there was no evidence of any agreement between Ford and any dealer not to resell crash parts to FLM or to fix the dealers' prices to FLM; that FLM's claim of an illegal

* The Petition suggests (p. 29) that the Commission has disapproved of Ford's incentive allowance by announcing that it will not approve discounts to a wholesaler "contingent upon the imposition of specified restrictions upon his customers by him." Since Ford places no restrictions whatsoever on how its dealers may dispose of crash parts once they buy them—much less on what the dealers' customers may do—Ford's incentive allowance policy is in no way inconsistent with the cited Commission advisory opinion.

combination between Ford and its wholly-owned marketing subsidiary was unsupported by the evidence; and that there was no substance whatsoever to FLM's charges of monopolization.*

A unanimous Court of Appeals reversed the District Court's finding of price discrimination,** since Ford's incentive allowance policy treated all of its purchasers equally, and affirmed the District Court's dismissal of the Sherman Act claims. Because the Court of Appeals reversed the District Court's finding of discrimination as a matter of law, it did not reach other issues raised by Ford, such as FLM's standing (as a non-purchaser) to litigate a Section 2(a) claim, whether the incentive allowance was injurious to competition, and whether damages were properly proven.***

There Are No Reasons for Granting the Writ

The decision of the Court of Appeals was eminently correct, was fully in accord with all applicable precedents and legal principles, and raises no issue warranting review by this Court.

A. This Case Presents No Substantial Question Under The Robinson-Patman Act

The Court of Appeals held that Ford did not violate the Robinson-Patman Act because it afforded precisely equal treatment to each and every one of its purchasers of crash

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* The Petition does not seek review of either of these latter two determinations which were affirmed by the Court of Appeals.

** Judges Mansfield, Oakes and Gurfein. Judge Mansfield wrote the Court's opinion.

*** These issues would have to be decided adversely to Ford in the Court of Appeals before FLM could recover damages under its Robinson-Patman Act theory.

parts. That holding, which derives from "the plain language of the Act"* and is in keeping with every decided case and every acknowledged authority, presents no issue meriting review by this Court.

Section 2(a) provides, in relevant part:

> "that it shall be unlawful for any person . . . *to discriminate in price between different purchasers* of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to . . . injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them." (Emphasis added).

As the Court of Appeals noted (p. a-13), the statute by its very terms applies only when the defendant discriminates in price between "different purchasers." Ford has not discriminated between different purchasers. No purchaser from Ford has been treated differently from any other purchaser; all are afforded identical price treatment.

Since FLM has never been a purchaser from Ford, either direct or indirect, the only claim of "discrimination" made here is based on the difference between the price a dealer pays for crash parts when he resells them to an independent repair shop and the higher price a dealer pays when he disposes of the parts in any other manner—including use in his own repair operation or resale to FLM. But that difference, as the Court of Appeals held, is not a discrimination because equality of treatment is the very antithesis of discrimination; every Ford dealer was treated alike in the pricing of crash parts purchased from Ford. Every dealer reselling to FLM paid the same price to Ford; and the same was true with respect to every dealer

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* (p. a-13).

reselling to independent repair shops. Thus, there was no favored dealer, no disfavored dealer, no price discrimination and no violation of the Robinson-Patman Act. In the Court of Appeals' words (p. a-21), "having treated its dealers equally here, Ford fulfilled its duties under the Act."

FLM makes no effort to reconcile its position with the language of Section 2(a). It simply ignores what the statute says—that the discrimination be between different purchasers.

Unable to quarrel with the soundness of the Court of Appeals' legal analysis, FLM argues that the decision below would nullify the Robinson-Patman Act by enabling any seller wishing to avoid its strictures to do so by "the simplest subterfuge of having an intermediate level of distribution." (Petition, p. 35). It cites the hypothetical case of a seller desiring to grant a chain-store purchaser a lower price than a competing retailer. To effectuate this scheme according to FLM, the seller could simply create a new "wholesaler" and provide it with a discount only on sales to chain stores. (Petition, pp. 22-23). Aside from the fact that success of such a subterfuge could not be guaranteed without illegal vertical price fixing,* FLM's hypothetical case bears no resemblance whatsoever to this one. First, the purpose of Ford's incentive allowance was to make it possible for independent repair shops to purchase crash parts from Ford dealers at the *same* price such dealers purchased similar parts from Ford for use in their own repair operations. Second, Ford did not create an intermediate level of distribution; it has at all times sold crash parts exclusively to its franchised dealers. It

* Only in such circumstances could the seller be certain that the "wholesaler" would pass on its lower price to the chain store for whose benefit the scheme was designed.

was *FLM* which inserted itself as an additional distributional link and then complained when Ford did not offer the incentive allowance to dealers reselling to FLM.

Moreover, the Court of Appeals took pains to dispel any notion that its ruling could be construed to permit evasion of the Robinson-Patman Act by subterfuge:

> "We do not suggest or imply that, if a manufacturer grants a price discount or allowance to its wholesalers . . ., which had the purpose or effect of defeating the objectives of the Act, § 2(a)'s language may not be construed to defeat it." (p. a-18).

Here, however, the record does not support any "inference that Ford's incentive payment plan has been simply a device to achieve indirectly a price discrimination forbidden by the Act." (p. a-19). To the contrary:

> "[T]he record indicates that the 1971 revision of the plan was an attempt to further implement Ford's original intention of funnelling crash parts at reasonable prices to independent repair shops so as to improve competition in the auto repair business, and was not a device to circumvent the Act." (pp. a-19-a-20).

FLM strains to find some inconsistency between the Court of Appeals' ruling and this Court's decisions in *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960); *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969) and *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968). No such inconsistency exists. Both *Anheauser-Busch* and *Perkins* were cases involving different prices to different purchasers from the allegedly discriminating seller. Significantly, in each case the disfavored purchaser had been a direct buyer from the alleged discriminator. Here, FLM was not a purchaser from Ford and FLM's suppliers, which did purchase from Ford, were all treated equally.

The statement in *Anheuser-Busch* that "a price discrimination . . . is merely a price difference" (363 U.S. at 549) does not mean that a dual pricing system offered and (realistically) available to all customers equally is discriminatory. Such a wooden reading would brand as discriminatory such normal business practices as cash discounts for prompt payment or quantity discounts available to even the smallest customer, whenever one purchaser elected not to avail himself of the lower price. *Anheuser-Busch* has never been interpreted to yield so unrealistic a result. See F. Rowe, *Price Discrimination Under The Robinson-Patman Act* 97 (1962).* Moreover, as the Court of Appeals pointed out, *FTC* v. *Borden Co.*, 383 U.S. 637 (1966), made it "clear that the language in *Anheuser-Busch* does not imply that the Robinson-Patman Act requires the uniform pricing rigidity FLM here asks but, on the contrary, permits a seller to offer dual prices to its customers on an equal basis." (p. a-15). In *Borden* this Court remanded for a determination of whether an admitted price differential was "discriminatory within the meaning of the Act" (383 U.S. at 646)—a holding totally at odds with the notion that every price differential is automatically a price discrimination.** *See also FTC* v. *Morton Salt Co.*, 334 U.S. 37, 42 (1948).

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* *See, e.g., Boss Mfg. Co.* v. *Payne Glove Co.*, 71 F.2d 768, 770 (8th Cir.), *cert. denied*, 293 U.S. 590 (1934) (under original Section 2 of the Clayton Act); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 389 F. Supp. 1334, 1341 (N.D. Calif. 1975); *Tosa Chrysler-Plymouth, Inc.* v. *Chrysler Motors Corp.*, 1974-1 CCH Trade Cas. ¶ 75,006 (E.D. Wis. 1974); *Chapman* v. *Rudd Paint & Varnish Co.*, 409 F.2d 635, 644 (9th Cir. 1969); *Cannon Mills, Inc.*, FTC Docket 7494, p. 47 (initial decision Dec. 3, 1963), *aff'd without opinion*, 65 F.T.C. 408 (1964).

** The Court of Appeals also correctly distinguished *Anheuser-Busch* as a case "dealing with a claim of primary-line territorial price discrimination under which Anheuser granted lower prices to dealers in the St. Louis area, but not to those located elsewhere

(footnote continued on following page)

As for *Perkins,* the opinion below disposes of FLM's argument:

> "In that case, it was established that the seller had discriminated in price against some of its purchasers; the only question was [the] level of distribution at which the requisite competitive injury could be shown." (p. a-16, n.6).*

Fred Meyer also has no bearing on the present case because it involved a different Section of the Robinson-Patman Act from that involved in this case. *Fred Meyer* "did not invoke § 2(a)'s applicability to price adjustments" (p. a-17), but rather concerned Section 2(d)'s prohibition of promotional allowances which are not proportionally equal. As the Court of Appeals explained:

> "[T]he Court [in *Fred Meyer*] did not suggest that it intended, by analogy or otherwise, to interpret § 2(a) as requiring a manufacturer to equalize prices charged to those performing different functions in

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(footnote continued from preceding page)

for the purpose of driving out competition." (pp. a-14-a-15). FLM's effort to cast doubt on that distinction is not only unavailing but the cited authority is mischaracterized. The Petition asserts (p. 30) that the *Anheuser-Busch* formulation applies "in situations not dealing with primary line cases," citing *Hampton* v. *Graff Vending Co.*, 478 F.2d 527 (5th Cir. 1973). The *Graff Vending* case was in fact found by the Court of Appeals to be a case of primary-line territorial discrimination precisely like *Anheuser-Busch*. (478 F.2d at 532).

* The Petition also suggests that the decision of the Court of Appeals conflicts with *Mueller Co.* v. *FTC*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964). Again, the court below provided the complete answer: "[T]he gravamen of the discrimination found in Mueller was not the provision of the 10% discount to jobbers as compensation for their wholesaling services, but rather the fact that eligibility to enter this favored class was only selectively recognized and not made equally available to all jobbers. Here, in contrast, Ford did not arbitrarily select some of its dealers and limit incentive payments to them. Rather, such payments were available to all Ford dealers purchasing from Ford." (pp. a-20-a-21).

> the line of distribution. Indeed, to do so, as Justice Harlan's dissent in *Fred Meyer* noted, 390 U.S. at 361, would be to run afoul of the Sherman Act. If, in order to avoid violation of the Robinson-Patman Act, Ford were required to fix the prices at which FLM purchased parts from Ford dealers so that the prices to both would be equalized, Ford would be open to the charge of illegal price fixing." (p. a-18).

In the final analysis, the decision of the Court of Appeals, holding that there can be no price discrimination between purchasers when all purchasers are treated alike, is unassailable as a matter of statutory language, precedent and common sense. There is accordingly no Robinson-Patman issue meriting Supreme Court review.

B. This Case Presents No Substantial Question Under The Sherman Act

The Court of Appeals' ruling affirming the dismissal of FLM's claim under Section 1 of the Sherman Act applied well settled principles of law to the facts as found by the District Court. Indeed, a method of pricing similar to that challenged here was recently approved by this Court in *Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc.*, 425 U.S. 1 (1976). Moreover, the judgment below does not conflict with any decision of other courts of appeals.

The Court of Appeals correctly interpreted *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), to hold "that an 'explicit agreement or . . . silent combination or understanding restricting the persons to whom . . . goods might be resold [is] an essential condition of a *per se* violation" of Section 1. (p. a-24). The absence of that "essential condition" is dispositive here. The Court of Appeals unanimously affirmed the District Court's express finding that there was no agreement or understanding between Ford

and its dealers restricting the customers to whom or the prices at which such dealers could resell crash parts. (pp. a-70; a-24). To the contrary, Ford dealers were free at all times to resell crash parts to FLM at any price mutually agreeable to FLM and the dealers—and they in fact did so.*

Far from there being any inconsistency between the decisions below and prior authority, the opinions of the lower courts here are squarely within this Court's recent decision in *Abbott Laboratories* v. *Portland Retail Druggist Assn., Inc.*, 425 U.S. 1 (1976). In that case, which involved the scope of the Robinson-Patman Act exemption granted under 15 U.S.C. § 13c for sales of supplies to non-profit institutional purchasers "for their own use," Abbott, a drug supplier, expressed concern that a pricing system which took account of the subsequent use of drugs by non-profit institutions might run afoul of *Schwinn* and subject suppliers to "retroactive exposure to claims." (425 U.S. at 20).

In responding to Abbott's contention, this Court completely disposed of FLM's Section 1 theory here. Justice Blackmun, speaking for the Court, concluded that while Abbott's concern was "understandable," it was "over-

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* Petitioner's reliance on *Albrecht* v. *The Herald Co.*, 390 U.S. 145 (1968), and *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966) (Petition, pp. 39, 41), is totally misplaced. In *Albrecht*, defendant sought to coerce plaintiff into lowering his resale prices by partially terminating his delivery route, seeking to solicit customers away from him and employing a temporary replacement until such time as he acquiesced in defendant's resale pricing policies. 397 U.S. at 147-48. Similarly, in *General Motors*, dealers were coerced into refusing to deal with automobile discounters by a variety of tactics, including personal threats to errant dealers "to knock their teeth down their throats" if they continued selling to discounters. 384 U.S. at 136. In the words of this Court, *General Motors* presented a "classic conspiracy in restraint of trade." 384 U.S. 140. Here, by contrast, the District Court's factual findings preclude any such conclusion, as the Court of Appeals pointed out. (p. a-23).

stated": a supplier's adjustment of its sales price based on records submitted by non-profit customers, indicating the post-sale use of the product by such customers, would not subject the supplier to antitrust liability under *Schwinn*. (425 U.S. at 20-21).

This Court's invitation in *Abbott* to engage in the record-keeping necessary to effectuate dual pricing to the same customer—which is precisely what Ford does with respect to crash parts—is fundamentally inconsistent with any suggestion that such dual pricing could constitute a post-sale restraint in violation of Section 1.

Nor is there any merit in FLM's contention that two court of appeals decisions are in conflict with the decision below. (Petition, pp. 37-38). Both cases are wholly inapposite.

In *Reed Brothers Inc.* v. *Monsanto Co.*, 525 F.2d 486 (8th Cir. 1975), *cert. denied*, 423 U.S. 1055 (1976), the issue was whether there was sufficient evidence of an agreement between Monsanto and its distributors restricting distributor resales to wholesalers to support a jury verdict for the plaintiff. The Eighth Circuit concluded that there was "clear evidence" from which the jury *could* have found that Monsanto's "rebate" policy was a "cooperative program amounting to a 'contract, combination . . . or conspiracy' . . ." (525 F.2d at 496). The Court of Appeals expressly noted that although the avowed purpose of Monsanto's rebate program "was to help cover higher costs incurred by distributors" selling to retailers, its "direct effect was simply to eliminate wholesalers and discounters." (*Id.* at 490). Moreover, the rebate policy was intertwined with territorial restrictions which the Eighth Circuit found were "firmly and resolutely enforced" by Monsanto through warnings to distributors not to sell to plaintiff. (525 F.2d at 495-496). Here, on the other hand, the District Court

specifically found no agreement—Ford dealers were free to resell crash parts to any customers, anywhere—and FLM's own evidence showed that FLM purchased almost $2 million worth of crash parts from Ford dealers after Ford's incentive policy revision became effective with respect to resales by dealers to FLM. These facts fully distinguish *Reed Brothers.*

Equally beside the point is *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976). In that case—unlike this one—it was undisputed that the plaintiff-franchisees had entered into written contracts with the defendant-franchisor which contained provisions obligating the franchisees to pay 55% more royalties to the franchisor on sales made outside the franchisees' "areas of primary responsibility." The question considered by the Fifth Circuit was whether such contractual provisions were agreements for purposes of Section 1 if they were not "firmly and resolutely enforced." The Court answered the question affirmatively. (537 F.2d at 1318). No such issue is presented here, since there were no agreements in the first place. Ford unilaterally offered an allowance to those of its dealers who resold crash parts to retail customers; it was entirely up to the dealers to decide whether to resell to such customers and at what prices and terms. The Court of Appeals correctly observed that the "logic" of FLM's argument (*i.e.*, that a unilaterally offered discount to dealers reselling to retailers violates Section 1) "not only ignore[s] the language of § 1 but in effect require[s] that all functional discounts be outlawed." (p. a-25). Such a proscription of long sanctioned market practices finds no support "in § 1 or elsewhere." (*Id.*).

In sum, there is no substance to FLM's Sherman Act claim. The courts below correctly disposed of it on the facts, and it raises no issue meriting review by this Court.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Dated: January 28, 1977

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